

The International Regime from an Implementation Perspective: What Legislation Can (and Cannot) Do.....and How this Affects the Vision and Nature of the Regime

Tomme Rosanne Young¹. Senior Legal Officer, IUCN Environmental Law Centre. E-mail: TYoung@iucn.org

This paper presents the perspective of a researching lawyer/legislative specialist currently coordinating a team of lawyers on legislative and practical implementation of ABS. It focuses on two basic questions - (i) what is possible from a legal perspective? and (ii) what is needed to enable 'the possible'? The one thing that it does not do is give any opinion about policy controversies, such as whether a new instrument is needed, whether the regime should be "binding or non-binding", and how the negotiations should proceed.²

After twelve years, legislative draftsmen and agencies are still attempting to grapple with complex legal problems that hinder effective access and benefit-sharing (ABS) implementation. ABS is in some ways "unique"- it is a merger of some very new concepts of commercial law and science with the goals of conservation, sustainable use and equity. To address these unique qualities (regardless of which policy choices are eventually chosen), new legal concepts and tools are needed, as well as new uses of existing tools. Legal innovation, however, is not an easy process.

Consequently, an important goal in these negotiations could be for the policy makers to give ABS the one thing it lacks - a "*roadmap*" for the solution of legal impediments that currently inhibit implementation. These legal impediments must be solved before any ABS legal regime can function effectively. Hence, the "legal roadmap" process can begin immediately, in parallel with more controversial discussions, rather than waiting for them to be decided.

At a minimum, such a roadmap could address two basic areas - the needs of *functional* ABS law and utilisation of the tools of commercial and market-based (contractual) frameworks.

ABS and the Basic Elements of Effective Legislative Systems

Legislation is more than just 'translation' of policy into legal/legislative language. The legislative draftsman must create a system that addresses objectives, but also functions effectively.

¹ This paper presents the views and 'expert input' of the author only. It does not, in any way, represent the views or policy of IUCN, its members, commissions, or secretariat.

² The author offers no opinion about the scope or results of 'negotiation of an international regime.' This paper assumes the goal of 'an *effective* regime' is shared by those who they feel a new instrument is needed (to 'create the regime') and those who propose review of existing instruments and processes (because they are not currently effective.)

Functionality is needed in any legal framework - whether binding or non-binding, voluntary or mandatory. It depends on the lawmakers' ability to weave laws, regulations, contracts, permits, and institutions into a system satisfying five basic legal/systemic requirements:

- legal consistency (including human, political, property and intangible rights);
- clarity about what is forbidden, permitted, encouraged, and/or mandatory;
- mechanisms that protect and give legal certainty to all parties;
- practically implementable enforcement mechanisms; and
- consistency related laws, frameworks, systems and tools.

Functional Consistency

A legislative regime is "functionally consistent" where everyone who applies it can clearly know whether the regime applies, understand what it means, and apply it to factual situations. This is also called the "Rule of Law" - where law and instruments are clear and rigorous, and where judges and administrators will apply legal standards rather than unfettered discretion.

In legal contracts and other instruments (including ABS), consistency means that the parties and others (including judges, in the case of dispute) know, with reasonable certainty, how all aspects of their arrangement will operate. Without it, the parties cannot determine whether the costs are reasonable or 'worth the effort.' Similarly, the system cannot function by waiting for a judicial determination on these matters for each negotiation. The draftsman must to create a system that is (i) unambiguous (clear and understood in the same way by all who review it), (ii) internally consistent, and/or (iii) governed by clear legal standards.

Regarding ABS, the Convention itself has hindered the creation of sufficient clarity, consistency and replicability. ABS implementation might be easier if the regime would provide:

- Certainty about which transactions and uses are covered by ABS, which transactions involve 'genetic resources' (requiring compliance with ABS) and which are 'biological resources' (which use conventional markets and instruments);³
- An effective legal means by which each source country can know of and protect its rights, after the genetic resources leave the country; and
- Accepted indicators that can be used to 'prove' that GR used in one country have come from a different country, and that the user has obtained a valid right to use them.

³ The Author has prepared a separate paper on these definitional issues, entitled "*Genetic Resources*" and "*Utilisation of Genetic Resources – a Legislative View*"

In the CBD negotiations, the Parties specifically opted not to negotiate clear provisions about what genetic resources are and how they are owned or transferred, leaving the clarification of these matters to national law.⁴ By not clarifying this at the international level, however, the negotiators left countries un-guided. Most have not clarified the definitions in national legislation - using the CBD definition, or adding other broadening phrases that do not add clarity.

One possible contribution of the international regime negotiations might be to clarify the meanings of key terms, including 'genetic resources' and the "use of genetic resources" and to address other uncertainties or deficiencies that have a legal/legislative effect.

Operative clarity

A legislative regime must clearly state which actions or conditions are forbidden, permitted, encouraged, or mandatory. In ABS laws, operative language generally focuses on two actions - the acquisition of genetic resources and the use of genetic resources. The CBD appears to assume that these will be 'permitted' either by general provisions allowing access and use of GR, or by laws stating that these activities will only be allowed with permission or ABS arrangement.

Consistent understanding is the first issue here. Users/providers/agencies must know objectively if a genetic or biological resource, or 'use of genetic resources' is involved. To enable enforcement, these facts (and the conditions of ABS arrangements and legislation) must be *objectively verifiable* - it must be possible to recognise and prove compliance/non-compliance from concrete facts and conditions that can be proven externally. Otherwise, in the case of violation, the system will not be enforceable among the parties, or in courts or administrative processes. The parties and officials must be able to prove compliance or non-compliance, or demonstrate their rights to a share of benefits or other remedy.

Once consistent understandings are codified, other key issues can be addressed, such as:

- Procedures for obtaining ABS permissions
 - public participation,
 - whether/how the government delegates its responsibilities for PIC, and
 - which person(s)/group(s) negotiate MAT and the limits on his/their authority.

Although not perfected, most countries' existing national law already contains procedural systems that can be models for PIC and MAT-related procedures in ABS. International experience and guidance on these matters, although often valuable, is only a supplement to the country's internal experience (the first and best guide to applying and implementing these requirements in its governmental/legal/cultural system.)

⁴ Glowka, L. et al, Guide to the Convention on Biological Diversity (1994)

- Remedies/controls for ABS compliance

There are fewer existing mechanisms as templates for ABS remedies in light of the ambiguity of certain key concepts. With objective ABS standards, it could be possible to use existing tools for ABS compliance.

Legal Assurance - Protecting those who Comply with the System

If it is to encourage governments, companies, and individuals to utilise the ABS system, the legal framework must meet two basic needs. One is consistency/predictability (see A.1, above).⁵ The other is “legal assurance.” The system must provide certain protection for the parties involved, including (i) governments, (ii) applicants, (iii) property owners or facilities that provide samples or allow them to be collected, (iv) user institutions, (v) middlemen, (vi) subsequent transferees, and (vii) other affected parties and beneficiaries (including those who acquire and use technological and commercial applications based on the GR). Each party invests time, money and other rights beginning with first negotiations. To encourage them to make this investment, their reasonable commercial expectations should be protected by law.

This type of legal assurance is promoted where the legal framework clearly and objectively defines/protects the rights that provider and user acquire by complying with the system.

- User Protection appears to require:

- a clear description of the rights granted in the ABS agreement, the limits of those rights and the responsibilities associated with them; and
- assurance about how and when an ABS agreement becomes “final.” Procedures for assuring finality can develop using existing laws as templates, once (i) is completed.

- Provider Protection appears to depend on:

- ability to monitor the user, or to have certainty regarding post-access uses of the GR;
- clear contractual statement, of the source’s rights if the user violates; and
- access to legal processes and incentive mechanisms where the resources are used.

Enforceability

For ABS, the enforceability question must initially be broken down into two categories - within the source country, and in other country(ies) in which the GR of the source country are used. In each category, countries have range of effective implementable enforcement solutions. Some of the challenges can be met through the regime negotiations, by the adoption (and trade-law acceptance) of (i) enforcement measures that deter both local and international parties from violating the law, (ii) mechanisms for source countries to obtain jurisdiction over the users and/or access to justice in user countries, and (iii) accepted evidentiary requirements (and enforcement capacity), enabling source country officials to make their cases successful in user country courts. Enforcement depends on *verifiable*

⁵ Research suggests that this factor is typically more important to users than a streamlined regulatory system.

evidence that meets the judicial standards of the country in which the enforcement action is taken (see A.2 above).

This raises two points. Firstly, enforcement questions must address two different kinds of 'actors': (i) Users under ABS arrangements who may be accused of violating those arrangements; and (ii) 'Bio-pirates' who take GR for commercial development without any ABS compliance. Secondly, many enforceability issues will only arise after the GR have left the source country. Current ABS monitoring seems to rely on reports from the user, raising two questions: How does the source country (and providers or communities) confirm reports? and, How can the source country determine that 'pirated' GR is yielding benefits to be shared?

Integration with other Relevant Laws and Processes

ABS implementation is one of a number of issues relating to genetic resources, property/sovereign rights, markets and other national laws, procedures, and social structures. The legislation must be consistent with broader national legislative frameworks or 'regimes.' In this regard, ABS presents interesting challenges, including its relationship with:

- laws on the marketing, purchase, sale, transport, and use of biological resources (from agricultural produce to wildlife to microorganisms);
- the biosafety framework, the protection of plant varieties/germplasm, food security, forests, transboundary waters and other source/habitat areas;
- legislative measures protecting communities embodying traditional lifestyles;
- the national system of laws relating to ownership of and transactions involving tangible and intangible property, and related sovereign rights and powers; and
- consumer protection and fairness in contractual/business negotiations and operations.

In practice, only where the ABS system has achieved an internal consistency and functionality can it be rationally integrated into a functionally rigorous national legal system.

ABS and Practical Components of Commercial Implementation

The need to create functionally consistent legislation is essential for any legal regime. This is particularly true where commercial or contract-based regimes may be applied and/or enforced by courts, and where elements such as consistency, clarity, and enforceability are essential. Where the legislation involves entities from other countries, these factors are more important. Beyond this, however, the development of a commercial framework such as ABS involves other factors (market forces and incentive systems) as key components of legislative success.

Integrating/Using Market Forces in ABS Regimes

There are several ways the international regime could improve the legislators' ability to utilise commercial tools (contracts, guarantees, and other trade instruments and controls) in

ABS implementation. The CBD's ABS provisions create a new international market (in GR) and recognition of this new market could prepare the way for the appropriate use of these tools.

Presently, of course, the "ABS market" is virtually unregulated. Like traders in any other unregulated market, many parties to ABS arrangements cannot gain the necessary legal certainty to rely on 'standard contracts'. Instead, they develop specific (sometimes detailed and complicated) ABS agreements and processes to address the need for clear indicators about whether or how conventional mechanisms apply.

If the ABS negotiators specifically recognise ABS as a market regime, this may help signal the need for national and international application of legal concepts relating to the governance of markets in intangibles, controlled resources, and commercial transactions between parties of unequal 'power' in the transaction, including:

- Market transparency (mechanisms such as transaction registration and reporting) by which relevant market information (including value information) is provided to parties;
- Transactional disclosure (provision of relevant information fairly and truthfully);
- Market oversight;
- Transactional protection (ensuring "fair play" even in unequal situations); and
- Standards of commercial equity and fairness.

These kinds of controls already exist in most developed countries (to govern trade in stocks and securities, precious and controlled substances, futures, real estate, and other commodities), and most commercial transactions in fair and functional markets around the world are subject to some or all of them. Up to now they have not appeared in ABS implementation for a variety of reasons (discussed previously). Once basic legislative hurdles are resolved, however, the specific application of these protections to ABS would certainly be possible.

Strangely, although this may sound like an increase in complexity, these changes will almost certainly result in greater simplicity. A network of these principles and requirements would give comfort to parties to any given transaction (and their legal advisors) that their primary interests are being protected. They will be able to simplify contracts and contract-development processes. The result will be greater confidence by source countries and providers, streamlined processes, and increased legal certainty for users.

Finding Effective Incentives for ABS Compliance

However, 'picture perfect' legislation is not enough. For a legal framework to achieve its objectives, it must address and utilise practical motivations in a way that supports those objectives. Laws cannot rely on enforcement alone to motivate compliance. It is obvious that there are not enough enforcement officials to oversee every action of every person.

Consequently, the requirements of law are typically only one of several factors underlying private decision-making, especially where it relates to commercial matters. Commercial non-

compliance, for example, usually occurs where (1) the actor concludes that, on the average, the cost and risk of being caught is less costly than the time, money, and other costs of complying, and (2) there is no other inherent motivation to comply with the law.

It can be difficult to find ways to enhance the motivation of users, source countries, and others to comply with the system. Unsupported generalisations and claims about incentives abound. However, when viewed in a practical perspective these claims often fall apart. There is an easy test of claimed "incentives":

- the incentive must provide a *benefit* to the person or entity whose behaviour it seeks to influence;
- this benefit must only be available if that person or entity engages in the *desired behaviour*; and
- the *perceived value of the benefit* must be greater than the cost of the desired behaviour. Unless all of these are true, the incentive will probably not motivate compliance among modern commercial operations.

Few of the 'incentives' that are offered as mechanisms for promoting ABS meet these tests:

- The public relations benefits of ABS compliance are limited by the fact that few members of the public have even heard of ABS, and virtually none understand it;
- International patent (PCT) and other legal rights systems currently do not appear to allow the conditioning of patent issuance on disclosure of origin in patent applications;
- The advantages of 'good relationships with source countries' although certainly important, may be less valued after the user takes the GR out of the source country; and
- There is no current indication that compliance with ABS will protect against future lawsuits or make other legal processes easier.

These are the primary 'benefits' suggested as motivations for ABS compliance by users. However, if ABS is operated under market/commercial law, it may also utilise market/commercial incentives. In essence, market incentives like most market activities, are the products of 'trade-offs' - the parties buy and sell based on what each item, right or activity is worth to them. Each party's situation is different, so each compares its internal valuation of whatever that they received against their internal value of whatever they gave.

Currently, the market incentives in the ABS realm are not clear or compelling. This may, in part, be caused by the CBD's decision to separate the components of genetic resources. ABS processes, transactions and payments are completely severed from those of the products created.

For example, the ABS framework of issues is factually and closely linked to the Biosafety/GMO frameworks. The term 'genetic resources' appears to apply to both in the same way, and access to and use of genetic resources is directly (although not exclusively) connected to the

goal of creating genetically modified organisms (GMOs). National and international legislation of these two issues is almost completely separated. In effect ABS has become a one-sided discussion of the interests of source countries and providers, while biosafety is a separate one-sided discussion focused on clarifying and simplifying the objective of GMO creators - the introduction of GMOs.

It is possible that by re-linking the various GR issues one may discern areas of negotiation and compromise between those promoting ABS transactions and those involved in GMO transactions- thereby creating real commercial incentives on both sides of both issues.